Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-4 [illegible]

SUN FINANCE AND LOAN COMPANY,
Petitioner,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, SUN FINANCE AND LOAN COMPANY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on March 17, 1976.

OPINION BELOW

A. The opinion of the Supreme Court of Ohio, reported at 45 Ohio St. 2d 283, appears in the appendix hereto.

B. The opinion of the Board of Tax Appeals, State of Ohio, reported at Paragraph 11,629, 1975 Ohio Tax Reports CCH (January 7, 1975) also appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 17, 1976. A Motion for Rehearing was filed by Sun Finance & Loan Co. on March 29, 1976. The Motion for Rehearing was denied by the Supreme Court of Ohio on April 23, 1976. (App. 27a). This Petition for Certiorari was filed within ninety (90) days of that denial date. This court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

The State of Ohio refuses to allow Petitioner to apportion any amount of its net worth to states other than Ohio when computing the Ohio dealer-in-intangible tax. The question presented is whether such refusal violates the Due Process Clause of the 14th Amendment to the United States Constitution and the Commerce Clause of the United States Constitution.

OHIO STATUTORY PROVISIONS INVOLVED

Ohio Revised Code ("ORC") Section 5725.01 (B) provides as follows:

> "(B) 'Dealer in intangibles' includes every person who keeps an office or other place of business in this state and engages at such office or other place in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities, whether on his own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings. Dealer in intangibles excludes institutions used exclusively for charitable

> purposes, insurance companies, and financial institutions. Neither casual nor isolated transactions of any of the kinds enumerated in this division of this section, nor the investment of funds as personal accumulations or as business reserves or working capital constitute engaging in business within the meaning of this division of this section; but a person who, having engaged in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness on his own account, remains in business for the purpose of realizing upon the assets of such business is deemed a dealer in intangibles, though not presently engaged in lending money or discounting or buying such securities."

ORC Section 5725.13 provides as follows:

> "The following property shall be listed and assessed at its fair value and taxed only in the manner prescribed in sections 5725.01 to 5725.26, inclusive, of the Revised Code:
>
> "(A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state;
>
> "(B) The shares of the stockholders, partners, or members of an unincorporated dealer in intangibles having an actual place of business in this state, the capital stock of which is divided into shares held by the owners, to the extent represented by capital employed in this state;
>
> "(C) The property representing capital employed in this state by an unincorporated dealer in intangibles whose capital stock is not divided into shares, having an actual place of business in this state."

ORC Section 5725.14 provides as follows:

"Each dealer in intangibles shall return to the tax commissioner between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, his resources and liabilities at the close of business on the thirty-first day of December next preceding. In the case of an unincorporated dealer in intangibles, such report shall also exhibit the amount or value as of the date of conversion of all property within the year preceding the date of listing, and on or after the first day of November converted into bonds or other securities not taxed to the extent such nontaxable bonds or securities may be shown in his resources on such date, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities.

"If a dealer in intangibles maintains separate business offices, whether within this state only or within and without this state, said report shall also show the gross receipts from business done at each such office during the year ending on the thirty-first day of December next preceding.

" 'Gross Receipts' as used in this section and section 5725.15 of the Revised Code, means, in the case of a dealer in intangibles principally engaged in the business of lending money or discounting loans, the aggregate amount of loans effected or discounted; in the case of a dealer in intangibles principally engaged in the business of selling or buying stocks, bonds, and other similar securities either on his own account or as agent for another, gross receipts means the aggregate amount of all commissions charged plus one per cent of the aggregate amount of all other receipts.

"As used in this section and section 5725.15 of the Revised Code business is considered done at an office when it originates at such office, but the receipts from business originating at one office and consummated at another office shall be divided equitably between such offices.

"An incorporated dealer in intangibles which owns or controls fifty-one per cent or more of the common stock of another incorporated dealer in intangibles may, under uniform regulations prescribed by the tax commissioner, make a consolidated return for the purpose of sections 5725.01 to 5725.26, inclusive, of the Revised Code. In such case the parent corporation making such return is not required to include in its resources any of the stocks, securities, or other obligations of its subsidiary dealers, nor permitted to include in its liabilities any of its own securities or other obligations belonging to its subsidiaries."

ORC Section 5725.15 provides as follows:

"Upon receiving the report required by section 5725.14 of the Revised Code, the tax commissioner shall ascertain and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state by such dealer in intangibles, according to the aggregate fair value of the capital, surplus, and undivided profits as shown in such report, including in the case of an unincorporated dealer, the value of property converted into nontaxable bonds or securities within the preceding year, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities.

"If a dealer has separate offices, whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer, wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising.

"The aggregate book value of the capital, surplus,

and undivided profits of a dealer in intangibles as shown in such report shall be taken as the fair value thereof for the purpose of the assessment required by this section, unless the commissioner finds that such book value is greater or less than the then fair value of said capital, surplus, and undivided profits. Claim for any deduction from book value of capital, surplus, and undivided profits must be made in writing by the dealer in intangibles at the time of making his return.

"Whenever the commissioner assesses the fair value of the capital, surplus, and undivided profits of a dealer in intangibles at an amount in excess of the book value thereof as shown by its report, or disallows any claim for deduction from book value of such capital, surplus, and undivided profits, he shall give notice and proceed as provided in section 5711.31 of the Revised Code."

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution which provides:

> "(The Congress shall have power) to regulate Commerce with foreign nations, and among the several states, and with the indian tribes; . . . ." U. S. Const. Art. 1, Sec. 8, Cl.3.

This case also involves the Due Process Clause of the 14th Amendment which provides:

> "(N) or shall any state deprive any person of life, liberty, or property, without due process of law; . . . ." U. S. Const., 14th Amend.

STATEMENT OF THE CASE

This case involves a refund claim by Petitioner for a portion of the "dealer-in-intangibles" tax paid to the State

of Ohio during taxable years 1967 to 1971, inclusive. Ohio taxes the "fair value" (net worth) of a dealer in intangibles ". . . to the extent represented by capital employed in this state." O.R.C. Section 5725.13.

Sun Finance and Loan Co. ("Sun"), incorporated in Ohio and qualified to do business in Ohio, is engaged primarily in the sales and consumer finance business. Sun is, therefore, a "dealer-in-intangibles." (O.R.C. 5725.01 (B)). Sun engages in this finance business in Ohio and (during the years in question) also in nine other states. In Ohio Sun conducts the finance business both on its own and through numerous subsidiary corporations. In the nine states other than Ohio, all of Sun's finance business is conducted by subsidiary corporations. These out-of-state subsidiaries are wholly-owned by Sun. They are not incorporated or qualified to do business in Ohio. They pay taxes to the states in which they do business. (Sun also owns subsidiaries engaged in businesses other than sales and consumer finance. The status of these subsidiaries is not at issue). During the years in question (1967-1971, inclusive) these out-of-state finance subsidiaries accounted for the following percentages of Sun's total loan volume:

1967	—	34.7%
1968	—	36.8%
1969	—	54.8%
1970	—	51.0%
1971	—	54.4%

The Ohio dealer-in-intangibles tax returns filed by Sun during 1967 - 1971 included in the tax base the net north of the parent and the out-of-state subsidiaries pursuant to Section 5725.13.

On May 22, 1972, Sun filed a refund application for the years in question. In its application, Sun contended that since it was required to include the net worth of all wholly-owned, out-of-state finance subsidiaries in the tax base, the gross receipts of these same subsidiaries must be used in determining the extent to which total net worth should be apportioned to Ohio, pursuant to the allocation formula found in O.R.C. 5725.15.

The Tax Commissioner for the State of Ohio determined that Sun was not able to file a consolidated return with the out-of-state finance subsidiaries because these subsidiaries had no office in Ohio and were, therefore, not "dealers" as that term is defined in O.R.C. Section 5725.01 (B). This holding made the O.R.C. Section 5725.15 allocation formula unavailable to Sun.

The Board of Tax Appeals reversed the Commissioner holding that it was necessary only for the "parent" (i.e., Sun) to conform to the statutory term "dealer" as defined in O.R.C. Section 5725.01 (B) for purposes of filing a consolidated return.

The Supreme Court of Ohio reversed the Board of Tax Appeals, agreeing with the Commissioner that Sun could not file a consolidated return with the wholly-owned subsidiaries. The Court further held that:

> "Sun is the parent corporation, and, as such, its capital account includes the value of its wholly-owned separately incorporated, out-of-state divisions. This capital is available for use in this state and thus is 'capital employed' in this state in accordance with section 5725.13, Ohio Revised Code."

Sun contends that this holding results in a palpable misapportionment of Sun's net worth to the State of Ohio

and thereby violates both the Commerce Clause and the Due Process Clause of the Federal Constitution.

This question has been raised by Sun in each state forum below, including the Board of Tax Appeals (App. 5a, 19a) which under Ohio law is powerless to decide constitutional questions. *S. S. Kresge Co.* v. *Bowers,* 170 Ohio St. 405 (1960). In the Supreme Court of Ohio, the question was raised and argued on brief. Following the Supreme Court's refusal to reach the issue (App. 21-22a, footnote one), Sun petitioned the Court for a rehearing on this precise question. The Supreme Court of Ohio denied the rehearing petition without opinion. (App. 27a)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IGNORES ECONOMIC REALTY AND PERMITS THE TAX COMMISSIONER OF OHIO TO APPLY THE THE RELEVANT OHIO STATUTES IN A MANNER WHICH PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner Sun does not contend that the Ohio statutes involved herein are unconstitutional. Sun does believe that the application of those statutes advocated by the Commissioner and approved by the Supreme Court of Ohio is unconstitutional. It is clear that a constitutional statute can be applied in an unconstitutional manner. *General Motors Corporation* v. *District of Columbia,* 380

U.S. 553 (1965). This Court has previously held that tax questions are determined on matters of substance and not of form. *Hans Rees Sons, Inc.* v. *State of North Carolina,* 253, U.S. 123 (1930). The Board of Tax Appeals below followed this reasoning and viewed Sun and its wholly-owned finance subsidiaries as a unitary business entitled to file a consolidated dealer-in-intangibles tax return pursuant to Section 5724.14, *supra.*

The home office of all finance subsidiaries is the same as the home office of the parent — 1015 Euclid Avenue, Cleveland, Ohio. All capital funds originate with and are furnished the finance subsidiaries by the parent. The officers and directors of the subsidiaries are also officers and directors of the parent. All loans to the subsidiaries are made by the parent. All accounting, taxes, personnel, purchasing, and funding are controlled by the officers and directors from 1015 Euclid Avenue, Cleveland, Ohio.

The Board of Tax Appeals held that Sun and its wholly-owned finance subsidiaries constitute a single economic unit and, accordingly, the business done by Sun through its wholly-owned finance subsidiary offices located outside the State of Ohio must be included in the apportionment formula to properly determine the amount of such capital employed within the State of Ohio. The decision of the Supreme Court of Ohio reversed the Board of Tax Appeals, holding that:

> "Sun has decided to operate its business using separately incorporated divisions rather than non-corporate branch offices or subsidiaries, apparently in order to limit its tort and contract liability. In so doing, however, Sun has exposed itself to greater R. C. Chapter 5725 tax liability, for each such separately incorporated division must keep an 'office or other place of business' in this state to qualify as a dealer

> in intangibles. Since no such offices exist, loans discounted by Sun's separately incorporated out-of-state divisions may not be included in the denominator of the R. C. 5725.15 allocation formula.
>
> "This result is mandated by statute, even though all such loans must be included in the assets of Sun in making the fair value computation, and, as such, its capital account includes the value of its wholly-owned, separately incorporated, out-of-state divisions. This capital is available for use in this state and thus is 'capital employed' in this state in accordance with R. C. 5725.13." (App. 26a)

In reality, the finance subsidiaries are by no means viable economic units capable of existing separately from the parent, Sun, but are vehicles used to extend a unitary business into states other than Ohio and thereby employ capital in states other than Ohio. The aggregate of corporate entities including the parent and its subsidiaries constitute one economic unit, entitled to file a consolidated return, as held by the Board of Tax Appeals.

In contrast to Ohio, California and New Jersey recognized that existence of separate corporate entities whose stock is owned by a common parent corporation does not prevent a unitary basis of apportionment and taxation. *Edison California Stores, Inc.* v. *McColgan,* 176 P.2d 697 (1947), rehearing 183 P.2d 16 (1947); *F. W. Woolworth* v. *Director of Division of Taxation,* 45 N. J. 466 (1965), 213 A.2d 1.

Despite the fact that Sun and its subsidiaries are clearly an economic unity, the Tax Commissioner has refused to allow Sun to apportion any part of its net worth. This appears obviously unjust when one recalls that from one-

third to over one-half of Sun's total loan volume was generated *outside Ohio* during the years in question.

This Court once used an example to demonstrate the unconstitutionality of a Tax Commissioner's application of a statute. *General Motors, supra.* The same could be done in the instant case. Assume Sun had only one office in Ohio but was the parent corporation for thousands of subsidiaries located in all of the other forty-nine states. The Tax Commissioner of Ohio (and the Supreme Court of Ohio, according to *Sun* below) would hold that 100% of this company's net worth would be taxable by Ohio. No allocation would be allowed despite the fact that, in this example, less than one-tenth of one per cent of the loans would be generated in Ohio. This example is only intended to highlight Sun's actual position *vis-a-vis* the State of Ohio. Ohio taxes 100% of Sun's net worth despite the fact that in the years at issue anywhere from one-third to one-half of Sun's business was generated in other states.

Sun respectfully submits that the State of Ohio, through the statutory application approved by the Supreme Court of Ohio, is overreaching and thereby creating an undue burden on interstate commerce. *Hans Rees Sons, Inc., supra.* By ignoring the economic realities of a vertically integrated company like Sun, Ohio taxes more than its fair share. It is well settled that a state will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to project the taxing power of the state plainly beyond its borders. *Norfolk and Western Railway Company, et al.* v. *Missouri State Tax Commissioner,* 390 U.S. 1046 (1968).

2. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF OTHER STATE COURT DECISIONS CONSTRUING SIMILAR STATUTES REGARDING THE CONSUMER FINANCE INDUSTRY.

Other state Supreme Courts have considered the effects of including the value of investments in subsidiaries in the capital stock while excluding the receipts, assets and other factors arising from the subsidiaries from the apportionment formula.

Such a case was presented by *Household Finance Corporation* v. *State Tax Commission of Maryland,* 212 Md. 80, 128 A.2d 640 (1957), noted in 17 Md. L. Rev. 327 (1957), in which the Supreme Court of Maryland considered the application of Maryland's capital stock tax to a foreign small loan company. Household is a Delaware corporation with its principal offices in Chicago and with regional offices in various parts of the United States and Canada. Its business is that of making installment cash loans to consumers. During 1952, the year in question, the taxpayer owned all, or substantially all, of the capital stock of ten subsidiary corporations, nine of which carried on the same type of business as the parent company. The parent operated in Maryland through its own direct branches without the subsidiaries. Household's consolidated balance sheet, as of the end of the taxable year, showed assets of approximately $340,000,000, consolidated gross income of $75,000,000 and consolidated net income of about $13,000,000.

The Maryland statute imposes a capital stock tax measured by the full cash value of the capital stock. In the case of foreign finance corporations, there is to be assessed so much of the capital stock "as represents the business done in this State." The tax was assessed on the basis of

the single factor gross receipts formula applied to the value of the capital stock which took into account the value of the investment in the subsidiaries. The Court analyzed the action taken by the State Tax Commission as follows:

> "What the Commission actually did can be described in terms of fractions. It was simply this: the Commission, in constructing the fraction to calculate business done within and without the State, used as the numerator total gross receipts within the State; and, in determining the denominator, used, not total gross receipts of the parent company (excluding intercompany transactions) plus total gross receipts of subsidiaries, but total gross receipts of the parent, plus interest, supervision fees and dividends paid to it by the subsidiaries." (212 Md. at p. 97, 128 A. 2d at p. 649)

In holding that this action was erroneous, the Court declared:

> "We have just determined that Household's business is unitary, and we have upheld the Commission's valuation of it as such, for the Commission has taken the appraisal of the market and the market makes its appraisal of the business as a unit very largely on the basis of the consolidated assets, liabilities and earnings of the parent and its subsidiaries, as well as on the basis of yield. In allocating the value of the property and business of that entity attributable to Maryland, the statutes under which the Commission is acting require the exclusion of business and property outside of Maryland. These statutes further provide a presumption that 'in the absence of clear evidence to the contrary' the proper basis of apportionment is the ratio of gross receipts or earnings in Maryland to gross receipts or earnings outside of Maryland (subject to an exception not here pertinent). We think that the record affords clear evidence that the presumption is

not correct in this case, from which it follows that it should not have been applied.

> *"In a few words, the basis for our view is this: if the Commission sees fit to arrive at the total value of a unitary enterprise on a consolidated basis, it cannot in fairness apportion that value as between Maryland and other jurisdictions on a basis which is inconsistent with, and which rejects, an element used in building up that value. Here, of course, that element is the earnings of the subsidiaries.* They have been discarded and the gross earnings of the parent company only have been used for the apportionment. The result has been to produce a considerably larger apportionment of value to Maryland than would have been reached if the gross earnings of subsidiaries, rather than the gross income which on an intercompany basis — the parent company derived from them had been used in determining the ratio of gross receipts in Maryland to gross receipts outside of Maryland. (212 Md. at pp. 97-98, 128 A.2d at p. 649)." (Emphasis Supplied)

The case was remanded for further action by the Tax Commission.

The Supreme Court of the State of Missouri gave the same taxpayer relief under its capital stock tax by excluding from the capital stock measure the value of the Company's investments in loans to the subsidiaries. *Household Finance Corp.* v. *Robertson,* 364 S.W. 2d 595 (Mo., 1963). The Ohio statute is structured to obtain the same end result as that of Maryland and Missouri. The courts of those states have construed their statutes so as to achieve a fair and equitable apportionment to avoid exceeding constitutional limitations. Ohio should do likewise for its citizens.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio.

Respectfully submitted,

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APPENDIX

[¶ 200-888] SUN FINANCE & LOAN COMPANY v. KOSYDAR.

Ohio Board of Tax Appeals, Nos. C-200 and C-201, January 7, 1975.

Property taxes -- Financial institutions — Determination of net worth. — A taxpayer conducting a consumer sales and finance business both within and without the State of Ohio, through a parent and wholly-owned subsidiary corporate organization, properly included the "business done" by its subsidiaries in the determination of net worth apportioned to Ohio for the purposes of the tax on financial institutions imposed by Sec. 5725.15 of the Revised Code. At the hearing before the Board of Tax Appeals, the taxpayer introduced evidence showing that the parent company and the subsidiary companies were one economic unit entitled to file a consolidated return. Citing the *Midland-Guardian Co.* case (¶ 200-498), the Board reversed the Tax Commissioner's final order, which disallowed the business done by the subsidiaries in the parent company's determination of net worth, and concluded that the "dealer in intangibles" was, indeed, the parent company and its subsidiaries.

See ¶ 21-061.

For appellant: Walker and Chatfield, by Burgess L. Doan, Harold W. Walker, and Joseph Beech, III.

For appellee: William J. Brown, Attorney General, by John C. Duffy, Jr., Assistant.

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein under date of June 26, 1974, from two final orders of

the Tax Commissioner, both dated June 4, 1974, which final orders in pertinent part read as follows: In Case No. C-200:

[*Tax Commissioner's final order*]

"This proceeding, being on the refund application of Sun Finance & Loan Company and subsidiaries on its dealer in intangible tax returns for the years 1967 through 1970, inclusive, came on to be considered for final determination under the authority of Section 5703.05 (B), Ohio Revised Code.

"The applicant, an Ohio corporation, has numerous wholly-owned subsidiaries located throughout the United States. The parent corporation and a majority of its subsidiaries are engaged primarily in the small loan and finance business.

"The applicant filed consolidated returns for the years 1967 through 1970 including therein the net worth of the parent corporation and subsidiary corporations qualifying as Ohio dealers in intangibles. Several of the subsidiary corporations which were not qualified to do business in Ohio and did not maintain an office or place of business in this state were accordingly excluded from the consolidated returns.

"The applicant filed its request for refund on the basis of *Midland Guardian Company* v. *Kosydar*, BTA No. 71-01-0224, March 28, 1972, contending that since it was required to include the net worth of all wholly-owned, out-of-state subsidiaries in the tax base, the business done by these same out-of-state subsidiaries must be used in determining the extent to which the total net worth should be apportioned to Ohio.

"Upon consideration of the information and evidence submitted, the Tax Commissioner finds as follows:

"1. that the parent corporation is an incorporated dealer in intangibles as defined in Section 5725.01 (B), Revised Code:

"2. the consolidated returns were filed in accordance with Sections 5725.14, Revised Code, which states:

'An incorporated dealer in intangibles which owns or controls fifty-one percent or more of the common stock of *another incorporated dealer in intangibles, may*, under uniform regulations prescribed by the tax commissioner, make a consolidated return for the purpose of sections 5725.01, to 5725.26, inclusive, of the Revised Code.' (emphasis added)

"3. the aggregate book value of the capital, surplus and undivided profits as shown on the consolidated returns *did not include* the aggregate book value of the capital surplus and undivided profits of the subsidiaries located entirely outside this state because these subsidiaries were not included in consolidated returns as filed and would not be entitled to be included therein because they fail to meet the definition of a dealer in intangibles as found in Section 5725.01 (B), Revised Code.

"The Tax Commissioner further finds the amount of capital employed in this state was ascertained in accordance with Section 5725.15, Revised Code, which reads in part:

'If a *dealer* has separate offices, whether within this state only or within and without this state, the commissioner shall find the *amount of capital employed in each office in this state*, which *shall bear the same ratio* to the *entire capital of such dealer*, wherever employed, *as the gross receipts of such office bears* to *the entire gros receipts of such dealer*, wherever arising.' (emphasis added)

"The Tax Commissioner, being fully advised in the premises, finds the taxes as assessed for the years 1967 through 1970, inclusive, were neither illegal nor erroneous and by reason thereof the applicant's request for refund is hereby denied."

In Case No. C-201 the final order is identical through the third numbered paragraph except that it concerns the year 1971.

Thereafter, following paragraph numbered 3, the final order of the Tax Commissioner in Case No. C-201 provides:

> "The Tax Commissioner further finds that applicant's claim for deduction from book value for bad debts is well taken; however, the book value of investments, furniture, fixtures, leasehold improvements and office supplies is not found to represent true value. Accordingly, the aggregate fair value of the capital, surplus and undivided profits for tax year 1971, upon recalculation, is held to be $9,281,100. Finding no errors in the original allocation of values, the Tax Commissioner hereby certifies the corrected values as follows:

County	*Value*	*Tax*
Ashtabula	$ 300,708	$ 1,503.54
Cuyahoga	4,477,200	22,386.00
Fairfield	346,186	1,730.93
Franklin	614,408	3,072.04
Lake	736,920	3,684.60
Lorain	203,256	1,016.28
Mahoning	503,036	2,515.18
Montgomery	251,518	1,257.59
Richland	362,892	1,814.46
Stark	710,932	3,554.66
Trumbull	774,044	3,870.22
TOTAL	$9,381,100	$46,405.50

> "The Tax Commissioner, being fully advised in the premises, finds the taxes as certified herein for the year 1971 are neither illegal nor erroneous and by reason thereof, the applicant's request for refund is denied. A copy of this determination shall be certified to the Auditor of State and Treasurer of State."

[*Taxpayer's notice of appeal*]

The notices of appeal filed herein in both cases are identical and read as follows in each case:

> "The Appellant, Sun Finance & Loan Co., hereby gives notice of appeal from the Certificate of Determination of the Tax Commissioner in the Department of Taxation of the State of Ohio, made under date of May 31, 1974. Notice of such determination was received by Appellant on the 3rd day of June, 1974. A copy of said determination is attached hereto and made a part hereof.
>
> "Appellant states that said determination is erroneous in the following respects:
>
> "(1) The determination is in direct conflict with the law of Ohio as set forth in the case of *Midland-Guardian Company* v. *Kosydar,* BTA No. 71-01-0224, decided by the Board of Tax Appeals on March 26, 1972. Appellant states that the issue involved in the *Midland* case is substantially identical to the issue presented in this appeal;
>
> "(2) The determination is unconstitutional in that it:
>
> "(a) assesses a tax upon interstate commerce; and
>
> "(b) denies Appellant due process of law and equal protection of the law.
>
> "WHEREFORE, Appellant prays for a finding by this Board that the determination of the Commissioner is in error and not according to law, and that the same be reversed with an appropriate order directing the Commissioner to revise his findings in accord with the principles of *Midland-Guardian, supra,* and to remit the proper refund to Appellant."

[*Stipulations*]

The parties hereto filed a prepared stipulation on September 18, 1974, and this stipulation, consisting of five (5) type-written pages provides:

"It is hereby stipulated and agreed between the Tax Commissioner of Ohio and the Sun Finance & Loan Co., by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction into evidence of any other facts on the grounds of irrelevancy or immateriality.

"(1) Sun Finance & Loan Co., incorporated in Ohio, qualified to do business in Ohio, is engaged primarily in the sales and consumer fiinance business in Ohio.

"(2) On tax listing day for 1967, Sun Finance & Loan Co. owned all of the issued and outstanding stock of the Sun Finance & Loan Companies Nos. 17-24, The Sun Finance & Loan Companies Nos. 125-127, The Sun Acceptance Corporations Nos. 150-162, The Sun Acceptance Corporations Nos. 164-177, all of which were either incorporated in Ohio or qualified to do business in Ohio.

"(3) On tax listing day for 1967, Sun Finance & Loan Co. owned all of the issued and outstanding stock (except for various state-required qualifying shares) in Sun States Life Insurance Co., Abby Insurance Agency, Inc., August Agency, Inc., Kingston Agency, Inc., Oakwood Agency, Inc., Tupper Insurance Agency, Inc., Park Industrial Bank, Federal Finance Corp., Potomac Service Corporation, Sun Finance Companies Nos. 1-9, Sun Finance Company No. 60, Sun Finance Companies, Nos. 261-263, Sun Finance Company No. 331, Sun Finance Companies

Nos. 41-48, Sun Finance Companies Nos. 549-551, Sun Finance Companies Nos. 601-607, Sun Finance Companies Nos. 81-87, Sentry Acceptance Corporations, Inc., Nos. 701-706, Sun Finance Companies Nos. 901-905, Sentry Acceptance Corporation, Inc., No. 1001, none of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(4) On tax listing day for 1968, Sun Finance & Loan Company owned all of the issued and outstanding stock of all the companies and/or corporations listed in paragraph (2) above and in addition Sun Finance & Loan Company No. 128 and Sun Acceptance Corporation of Cleveland, Ohio, all of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(5) On tax listing day for 1968, Sun Finance & Loan Co. owned all of the issued and outstanding stock (except for various state-required qualifying shares) of all companies and/or corporations listed in paragraph (3) above except Tupper Insurance Agency and Federal Finance Corporation, and in addition wholly owned Sun Finance Co. No. 471, Sentry Acceptance Corporations, Inc., Nos. 802-803, Sentry Acceptance Corporations, Inc. Nos. 851-853, Sentry Acceptance Corporations, Inc., Nos. 1002-1003, Sentry Acceptance Corporations, Inc., Nos. 1101-1103, Sun Finance Company No. 1201, Sentry Acceptance Corporations Nos. 1301-1302, Sun Finance Corporation No. 1401, Great Lakes Insurance Co., none of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(6) On tax listing day for 1969, Sun Finance & Loan Company owned all of the issued and outstanding stock of all corporations and/or companies listed in paragraph (4) above and in addition Sun Acceptance Corporation No. 178, all of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(7) On tax listing day for 1969, Sun Finance and Loan Company owned all of the issued and outstanding stock (except for qualifying shares) in all companies and/or corporations listed in paragraph (5) above and in addition wholly owned Sentry Acceptance Corporations, Inc., Nos. 804, 805, 854, 855, Longmont Industrial Bank, Sun Finance Company No. 1202, Sunamerica Corporation, none of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(8) On tax listing day for 1970, Sun Finance and Loan Company owned all of the issued and outstanding stock in all companies and/or corporations listed in paragraph (6) above, all of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(9) On tax listing day for 1970, Sun Finance and Loan Company owned all of the issued and outstanding stock (except for qualifying shares) in all of the companies and/or corporations listed in paragraph (7) above except Sunamerica Corporation, and in addition wholly owned Centennial Industrial Bank, Sentry Acceptance Corporation, Inc., No. 1104, Sun Finance Company No. 1203, none of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(10) On tax listing day for 1971, Sun Finance and Loan Company owned all of the issued and outstanding stock in all of the companies and/or corporations listed in paragraph (8) above except Sun Finance and Loan Companies Nos. 20, 127, 128, and Sun Acceptance Corporation No. 170, and in addition wholly owned Sun Acceptance Corporations Nos. 163, 177, 178, all of which were either qualified to do business in Ohio or were incorporated in Ohio.

"(11) On tax listing day for 1971, Sun Finance and Loan Company owned all of the issued and outstanding shares of stock (except for qualifying shares)

in all of the companies and/or corporations listed in paragraph (9) above except Sun Finance Company No. 901, Sentry Acceptance Corporations Nos. 1002, 1003, none of which were either qualified to do business in Ohio or were incorporated in Ohio."

[*Facts*]

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcripts furnished by the Tax Commissioner, the stipulation of facts filed by counsel for the parties on September 18, 1974, the testimony and evidence presented at a hearing before the Board of Tax Appeals in Columbus, Ohio, on September 19, 1974, and the briefs supplied by counsel.

Sun Finance and Loan Company ("Sun"), incorporated in Ohio and qualified to do business in Ohio, is engaged primarily in the sales and consumer finance business. (Stipulation #1) Sun engages in this business in Ohio both on its own and through numerous subsidiaries which are either incorporated in Ohio or qualified to do business in Ohio. (Stipulations #2, #4, #6, #8, and #10)

Sun Finance and Loan Company also engages in the consumer finance business in states other than Ohio. Sun carries on this business by means of subsidiaries located in the following states: Georgia, West Virginia, Kentucky, Tennessee, North Carolina, Louisiana, Florida, Colorado, and Texas. All of these subsidiaries are wholly-owned by Sun except for a minor number of state-required qualifying shares. None of these out-of-state subsidiaries are either incorporated in Ohio or qualified to do business in Ohio. (Stipulations #3, #5, #7, #9, and #11) (Sun Finance also owns subsidiaries engaged in business other than the sales and consumer finance business.)

Based upon business done during the calendar year 1966 through 1970, inclusive, Sun Finance and Loan Company filed consolidated dealer-in-intangibles returns in the taxable years 1967 through 1971, inclusive. Reported in the tax base were the net worth of the parent, the net worth of all Ohio subsidiaries, and the net worth of all out-of-state subsidiaries, including both subsidiaries engaged in consumer finance and those engaged in other businesses. (Appellant's Exhibit #1, Line #1) Upon examination, the Commissioner made additional assessments for each of the years involved (Appellant's Exhibit #1, Line #2), thereby increasing the total corrected net worth figures to the totals shown on Appellant's Exhibit #1 at Line 3 ("Total Net Worth Reported to Ohio per Correction Sheets"). Appellant Sun has agreed to accept the "Total Net Worth Per Correction Sheets" for each of the years involved herein.

On May 22, 1972, Sun filed a refund application for the years in question. This application was based on *Midland-Guardian Company* v. *Kosydar,* B. T. A. No. 71-01-0224, decided by the Board of Tax Appeals on March 28, 1972. In its application Appellant contended, on the basis of *Midland,* that since it was required to include the net worth of all wholly-owned, out-of-state subsidiaries in the tax base, the business done by these same out-of-state subsidiaries must be used in determining the extent to which the total net worth should be apportioned to Ohio.

Sun Finance and Loan Company and its finance subsidiaries discounted or effected loans during tax years 1967 of $82,327,132. Of this amount, $53,742,015 was discounted from Ohio offices and Ohio subsidiaries, for a percentage of Ohio loan volume to total loan volume of 65.3%. (Exhibit #2)

During taxable year 1968, Sun's total loan volume was

$84,545,791; its Ohio loan volume $53,458,502, for an Ohio/total percentage of 63.2%. (Exhibit #2)

During taxable year 1969, Sun's total loan volume was $90,662,560; its Ohio volume $49,987,492, for an Ohio/total percentage of 55.2%. (Exhibit #2)

During taxable year 1970, Sun's total loan volume was $93,933,499; its Ohio volume $46,061,437, for an Ohio/total percentage of 49.0%. (Exhibit #2)

During taxable year 1971, Sun's total loan volume was $78,879,760; its Ohio volume $35,979,195, for an Ohio/total percentage of 45.6%. (Exhibit #2)

Two applications for refunds were actually filed. The first application covered taxable years 1967 to 1970 inclusive and concerned only the issue discussed in this entry. The second application covered the taxable year 1971 and concerned not only the present issue but also a claim regarding the correct book value of various assets. This latter claim has since been resolved and is not at issue here. Because two separate applications were originally filed, however, the Commissioner was required to issue separate certificates and, on appeal, two case numbers were assigned. At trial, as noted earlier, the cases were consolidated, there remaining but one issue to be resolved.

In response to these refund applications, the Commissioner issued Certificates of Determination dated June 4, 1974, which found the taxes assessed to be neither illegal nor erroneous. Sun's request for refunds were [was], therefore, denied.

Sun Finance and Loan Company filed Notices of Appeal to the Board of Tax Appeals on June 26, 1974.

[*Issue*]

The sole question to be decided by the Board of Tax Appeals herein is whether or not the business done by appellant's out-of-state consumer finance subsidiaries should be used to determine the extent to which appellant's total net worth should be apportioned to Ohio.

[*Analysis*]

Sun Finance and Loan Company is, by statutory definition, a "dealer-in-intangibles" (5725.01 (B) O. R. C.). As such, it is subject to the tax which Ohio places on an incorporated dealer-in-intangibles.

Ohio Revised Code Section 5725.13 requires the following property to be listed and assessed at its fair value and to be taxed in the manner provided in Ohio Revised Code, Chapter 5725:

> "(A) The shares of the stockholders in an incorporated dealer-in-intangibles having an actual place of business in this state, to the extent represented by capital employed in this state."

Section 5725.15 defines "fair value" as "the aggregate book value of the capital, surplus, and undivided profits." The term "fair value" is, therefore, synonomous with the more common term "net worth."

In order to determine the amount of a dealer's capital which is employed in Ohio, Section 5725.15 Ohio Revised Code provides the following formula:

> "If a dealer has separate offices, whether within this state only or within and without this state, the Commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer,

> wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising."

Section 5725.14 defines "gross receipts":

> ". . . in the case of a dealer-in-intangibles principally engaged in the business of lending money or discounting loans, the aggregate amount of loans affected or discounted; . . . ."

Section 5725.14 provides in its last paragraph an option for an incorporated dealer-in-intangibles owning 51% or more control of the common stock of another incorporated dealer-in-intangibles, to make a consolidated return for the purposes of Chapter 5725 of the Ohio Revised Code. A parent company making such a consolidated return election *must* include in that return its subsidiaries in which it owns or controls at least 51% of the common stock. *The Procter & Gamble Company* v. *Evatt,* 142 O. S. 373 (1943) (See also Tax Commissioner's Regulation TX-41-04). In the case of a dealer-in-intangibles the subsidiaries so included must include the net worth of subsidiaries not engaged in the finance business as well as finance subsidiaries. *Household Finance* v. *Porterfield,* 24 O. S. 2d 39 (1970); *Certified Credit Corp.* v. *Bowers,* 174 O. S. 239 (1963). Sun Finance does not dispute these decisions. In fact, as seen by Appellant's Exhibit #1, lines #3 and #4, Sun Finance has agreed to a total net worth to be reported to Ohio (Line 3) which approximates or exceeds the net forth of the company per certified audit report. (Line 4)

Sun Finance and Loan Company filed consolidated tax returns during the years here involved. In conformity with cases and statutes Sun's "Net Worth" (or "Fair Value") figure, therefore, included the net worth of all of its sub-

sidiaries, wherever located and whatever their line of business.

Sun thus filed as if it were a single corporation, which is the logical solution for tax reporting of modern multi-corporate organizations. Indeed, at hearing, much testimony was introduced to prove that, economically speaking, Sun and its finance subsidiaries are, in effect, one company. (Tr. 12, 13, 19, 20, 22 and 23) All of the finance subsidiaries, wherever located, are totally dependent upon the parent (Sun) for their capital and are actually prohibited from attempting to procure capital on their own. (Tr. 12, 20) Sun's finance subsidiaries are, therefore, economic branches of the parent and are separately incorporated only in order to minimize the parent's potential exposure to tort or contract liability. (Tr. 12) Tax motives played no part in the decision to separately incorporate the branches. On the contrary, the record indicates that Sun pays taxes based on net worth to a number of states in addition to Ohio. (Tr. 13, 14)

In its refund request, Sun contended that it should be permitted to allocate the amount of capital employed in Ohio according to the ratio of Ohio loans discounted versus loans discounted from all offices. This is the formula provided by the statutes of Ohio. (O. R. C. 5725.15; 5725.14) The Tax Commissioner's refusal of said request apparently stems in part from his idea of who is the "dealer." This question has been decided by the *Household Finance* case, *supra*.

Household Finance held that the parent company in this situation is "the sole real party in interest." Thus, in the context of a consolidated return, only the sole real party in interest—i. e., the parent—must conform to the statutory term "dealer" as defined in 5725.01 (B) Ohio Revised Code. There can be no question that the parent

here, Sun Finance and Loan Company, does meet this definition. (Stipulation #1)

In each of appellee's exhibits, it chooses to treat all D. I. T. operations of any of appellant's out-of-state subsidiaries as though they are not Dealers In Intangibles and as such the Tax Commissioner refuses to consider the business done by such out-of-state subsidiaries.

[*Conclusion*]

This precise point was met and decided by the Board of Tax Appeals in *Midland-Guardian Co.* v. *Kosydar*—BTA Case No. 71-01-0224 dated March 28, 1972, and in that case the Board of Tax Appeals reversed the Tax Commisisoner and held that such business done by its out-of-state D. I. T. subsidiaries must be considered as D. I. T. business done. This decision was not appealed by the Tax Commissioner.

It is, therefore, the decision of the Board of Tax Appeals that the final orders of the Tax Commissioner refusing to grant refunds to the appellant must be reversed on that point and the computations of the appellant in its exhibits 1, 2 and 3 showing its entire operation are hereby approved with said three exhibits being set forth hereinafter so that the complete compilation and computation of refunds may be shown.

Appellant's exhibits 1, 2 and 3 are hereinafter set forth in their entirety showing the figures for the years 1967, 1968, 1969, 1970 and 1971.

Appellant's Exhibit 1

The Sun Finance & Loan Company Consolidated Ohio Dealer in Intangibles
Tax Return Claim for Refund of Taxes

CALCULATION OF NET WORTH TAX BASE	1967 12/31/66	1968 12/31/67
Total Net Worth Per Returns Filed	$6,825,528	$6,878,723
Net Worth Additions—Per Ohio Assessments	2,046,360	2,327,726
Total Net Worth Reported to Ohio (per correction sheets)	$8,871,886	$9,206,440
Net Worth Per Certified Audit Report	$8,727,420	$9,072,083
RECONCILING ITEMS:		
State Audit Assessments Not Recorded on Books:		
Furn. & Fixtures (True Value)	$ 34,968	$ 15,999
Leasehold Improvements (True Value)	56,420	98,725
Bad Debt Reserve	89,734	.....
Accrued Interest	1,858	3,509
Office Supplies	13,840	14,278
Reduction of 25% of Net Worth of Sun States Allowed		
Reduction of 25% of Net Worth of Great Lakes Allowed		
Error in Reported Net Worth of Subs on Tax Return	(41,354)	1,855
Deferred Development Expense Reclassified to Retained Earnings		
Certified Audit Adjustments for Dec., 1969, Recorded in Jan., 1970		
Subsidiary Liquidated 12/21/70, Recorded in Jan., 1971 (S. F. Co. —901)		
Preferred Stock Redemption Recorded in Dec., 1971, Not Reflected in Audit Report		
Total Net Worth Reported to Ohio Per Correction Sheet	$8,871,886	$9,206,449

1969 12/31/68	1970 12/31/69	1971 12/31/70	1969 12/31/68	1970 12/31/69	1971 12/31/70
$7,019,052	$6,634,015	$6,908,805	$ 8,620	$ 5,198	$ 8,168
2,415,246	2,845,950	2,372,295	12,789	15,518	14,794
					(375,881)
$9,434,298	$9,479,965	$9,281,100	15,344	15,647	14,850
			(38,087)	(37,786)	(38,098)
$9,485,566	$9,578,173	$9,732,800	(37,870)	(39,770)	(58,006)
				(6,160)	4,825
			(12,064)	(11,150)	(6,371)
				(39,705)	
					(15,981)
			$9,434,298	$9,479,965	$9,281,100

Appellant's Exhibit 2

The Sun Finance & Loan Company Consolidated Ohio Dealer in Intangibles
Tax Return Claim for Refund of Taxes

	Tax Return Years				
Calculation of Ohio Allocation Factor	1967 12/31/66	1968 12/31/67	1969 12/31/68	1970 12/31/69	1971 12/31/70
(A) Total Loan Volume —All Offices	$82,327,132	$84,545,791	$90,622,560	$93,933,499	$78,879,760
(B) Total Loan Volume —Ohio Offices	$53,742,015	$53,458,502	$49,987,492	$46,061,437	$35,979,195
(C) Percentage Allocable to Ohio (B ÷ A)	63.3%	63.2%	55.2%	49.0%	45.6%

Appellant's Exhibit 3

The Sun Finance & Loan Company Consolidated Ohio Dealer in Intangibles Tax Return Claim for Refund of Taxes

CALCULATION OF TAX:	1967 12/31/66	1968 12/31/67	1969 12/31/68	1970 12/31/69	1971 12/31/70
Total Net Worth (Exhibit #1)	$8,871,886	$9,206,449	$9,434,298	$6,634,015	$6,908,805
Ohio Percentage (Exhibit #2)	65.3%	63.2%	55.2%	49.0%	45.6%
Net Worth Allocable to Ohio	$5,793,342	$5,818,476	$5,207,732	$3,250,667	$3,150,415
Tax Rate	.005	.005	.005	.005	.005
Taxes Payable	$ 28,966.71	$ 29,092.38	$ 26,038.66	$ 16,253.34	$ 15,752.08
LESS:					
Taxes Paid Per Return as Filed	$ 34,127.63	$ 34,393.62	$ 35,095.26	$ 33,170.08	$ 34,544.03
Taxes Paid Per Additional Assessments	10,231.80	11,638.63	12,076.23		
TOTAL TAXES PAID	$ 44,359.43	$ 46,032.25	$ 47,171.49	$ 33,170.08	$ 34,544.03
REFUND DUE	$(15,392.72)	$(16,939.87)	$(21,132.83)	$(16,916.74)	$(18,791.95)

As appellant recognizes and considers that it is well established that the Board of Tax Appeals has no authority to determine the constitutional validity of a statute, no decision on such matter is made herein. See *S. S. Kresge Co.* v. *Bowers,* 170 O. S. 405.

It is therefore the order of the Board of Tax Appeals that the final order of the Tax Commissioner in Case No. C-200 be reversed and that said official be directed to grant refunds to appellant in the amounts set forth in appellant's exhibit 3 for the years 1967, 1968, 1969 and 1970. It is further the order of the Board of Tax Appeals that the final order of the Tax Commissioner in Case No. C-201 should be modified to the extent that the Tax Commissioner is ordered to grant a refund to the appellant for the year 1971 in the amount set forth in appellant's exhibit 3 and since appellant has accepted and does not contest the aggregate fair value of capital, surplus and undivided profits for the year 1971 as recalculated by the Tax Commissioner in the amount of $9,281,100, said final order of the Tax Commissioner as modified must be and hereby is, affirmed.

SUN FINANCE & LOAN COMPANY, APPELLEE, v. KOSYDAR, TAX COMMR., APPELLANT.

[Cite as Sun Finance & Loan Co. v. Kosydar (1976), 45 Ohio St. 2d 283.]

Taxation—Dealer in intangibles—Assessment—R.C. 5725.15 apportionment formula, construed—"Capital employed" in this state, construed.

(No. 75-105—Decided March 17, 1976.)

APPEAL from the Board of Tax Appeals.

Appellee, Sun Finance & Loan Company (hereinafter referred to as Sun), is an Ohio corporation primarily engaged in the sales and consumer finance business in Ohio. Sun operates its finance business through hundreds of offices located in approximately ten states, including Ohio.

Sun is the parent corporation, with numerous subsidiary corporations wholly owned by it, and operated as separate corporate divisions.

For each of the tax years pertinent to this appeal (1967-1971), a number of Sun's subsidiaries were either incorporated in, or qualified to do business in, Ohio, while others were not.

Based upon business done during the calendar years 1966 through 1970, inclusive, Sun filed consolidated dealer-in-intangibles returns in the taxable years 1967 through 1971, inclusive. In computing the tax base applicable to such consolidated returns, Sun totaled the net worth of all its Ohio subsidiaries and the net worth of all out-of-state subsidiaries controlled by it, regardless of whether such out-of-state subsidiaries operated offices within Ohio or were incorporated.

Upon audit, the Tax Commissioner recomputed certain assessments, and arrived at total corrected net worth figures for the years involved herein, which corrected figures were accepted by Sun.

On May 22, 1972, Sun filed an application for a refund based upon the March 28, 1972, decision of the Board of Tax Appeals in *Midland Guardian Company* v. *Kosydar*, B. T. A. No. 71-01-0224. This refund application pertained to the tax years 1967 to 1970, inclusive. Subsequently, Sun filed a second refund application pertaining to tax year 1971.

The Tax Commissioner denied both refund applications, whereupon Sun filed notices of appeal to the Board of Tax Appeals on June 26, 1974.

The causes were consolidated for hearing before the Board of Tax Appeals. On January 7, 1975, the board upheld Sun's claim for refund of a portion of the dealer-in-intangbles tax paid by Sun during the tax years 1967 to 1971, inclusive.

The cause is now before this court pursuant to an appeal as of right.

Messrs. Walker & Chatfield, Mr. Burgess L. Doan, Mr. Harold W. Walker and *Mr. Joseph Beech III*, for appellee.

Mr. William J. Brown, attorney general, and *Mr. John John C. Duffy, Jr.*, for appellant.

Per Curiam. The sole issue before this court is whether the business done by Sun's out-of-state consumer finance subsidiaries, which subsidiaries do not operate offices in Ohio, should be included in the R.C. 5725.15 apportionment formula utilized to determine the extent to which Sun's total net worth is to be allocated to Ohio.[1]

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[1] Sun also claims that "[a]cceptance of the interpretation urged by the commissioner would result in an unconstitutional method of taxation." Because the record is insufficient to warrant consideration of this asser-

There is no question that Sun is a "dealer in intangibles" as that term is defined in R.C. 2725.01 (B).[2] As such, Sun is admittedly subject to the Ohio dealer-in-intangibles tax. The question presented, then, is to what extent is Sun so subjected.

Resolution of the issue presented herein requires consideration of a number of statutory enactments.

R.C. 5725.13 provides, in pertinent part:

"The following property shall be listed and assessed at its fair value * * *.

" (A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state[.]"

R.C. 5725.14, which concerns the filing of returns and consolidated returns, provides, in pertinent part:

"Each dealer in intangibles shall return to the Tax Commissioner * * * annually, a report exhibiting in detail * * * his resources and liabilities at the close of business on the thirty-first day of December next preceding. * * *

"If a dealer in intangibles maintains separate business offices, whether within this state only or within and without this state, said report shall also show the gross receipts from business done at each such office during the year ending on the thirty-first day of December next preceding.

" 'Gross receipts' * * *means, in the case of a dealer in intangibles principally engaged in the business of lend-

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tation, we do not reach this issue. See *Petrocon* v. *Kosydar* (1974), 38 Ohio St. 2d 264.

2 R.C. 5725.01(B) provides, in pertinent part:

" 'Dealer in intangibles' includes every person who keeps an office or other place of business in this state and engages at such office or other place in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtdness * * *."

ing money or discounting loans, the aggregate amount of loans effected or discounted * * *

"* * *

"An incorporated dealer in intangibles which owns or controls fifty-one per cent or more of the common stock of another incorporated dealer in intangibles may, under uniform regulations prescribed by the Tax Commissioner,[3] make a consolidated return * * *."

R.C. 5725.15, which sets forth the allocation formula and instructions for valuation, provides, in pertinent part:

"Upon receiving the report required by Section 5725.14 of the Revised Code, the Tax Commissioner shall ascertain and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state by such dealer in intangibles, according to the aggregate fair value of capital, surplus, and undivided profits as shown in such report * * *.

"If a dealer has separate offices whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer, wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising."

Both parties rely upon two prior decisions of this court, *Certified Credit Corp.* v. *Bowers* (1963), 174 Ohio St.

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3 The Tax Commissioner has provided for consolidated returns in Rule TX-41-94, which provides, in pertinent part:

"An incorporated dealer in intangibles having availed itself of the privilege of filing a consolidated return, as herein provided, shall include therin all of its subsidiary incorporated dealers in intangibles in which it owns or controls at least fifty-one per cent of the common stock."

239, and *Household Finance Corp.* v. *Porterfield* (1970), 24 Ohio St. 2d 39, in support of their respective positions.

In *Certified Credit Corp.* v. *Bowers, supra,* the court held the "gross receipts formula" to be a reasonable method of allocation of capital and, as such, not violative of either the Due Process or the Commerce Clause of the United States Constitution. In so holding, the court construed and explained R.C. 5725.13, 5725.14, and 5725.15 in the following manner:

"By reading Sections 5725.13, 5725.14 and 5725.15 *in pari materia,* it is clear that the tax on the shares of shareholders of a dealer in intangibles is assessed at the fair value of the capital employed in this state, allocated on the basis of the ratio of the gross receipts of the Ohio office or offices from consumer financing to the entire gross receipts from the dealer's small-loan and consumer finance business. * * *" 174 Ohio St. at 241.

We do not construe *Certified Credit* as dispositive of the instant cause, however, as the opinion in that case does not indicate the manner in which the taxpayer therein operated its business. Although it is clear that out-of-state subsidiaries were involved in *Certified Credit,* it is not clear whether such subsidiaries were maintained as separately incorporated entities or as non-corporate divisions of the corporate parent. As a difference in R.C. Chapter 5725 taxation may result, as will be discussed *infra,* such distinction is crucial, and compels rejection of *Certified Credit* as controlling authority applicable herein.

In *Household Finance Corp.* v. *Porterfield, supra,* the court held, at page 42, that "* * * [T]he burden of the DIT tax falls * * * upon its [HFC's] issued and outstanding shares of capital stock; but only to the extent of the fair value of the capital employed (capital stock, surplus and undivided profits) in this state, measured by the ratio

which the Ohio gross receipts of HFC bear to its total gross receipts of DIT business. R.C. 5725.15."

In fn. 1 of the opinion in *Household Finance,* at page 40, the court indicated that the parent corporation, in filing a consolidated dealer-in-intangibles return pursuant to R.C. 5725.14, was the real party in interest with respect to its "corporate subsidiaries which are also engaged as dealers in intangibles in Ohio."

Analysis of *Household Finance Corp.* v. *Porterfield, supra,* reveals that only returns of dealers in intangibles as defined in R.C. 5725.01 may be included in an R.C. 5725.14 consolidated return, and, concomitantly, that only loans discounted by such dealers qualify for inclusion in the denominator of the R.C. 5725.15 apportionment formula.

In the instant cause, Sun included loans discounted by its wholly-owned out-of-state corporate subsidiaries in the denominator of the R.C. 5725.15 apportionment formula. Under *Household Finance,* however, only those loans discounted by a dealer in intangibles may be so included. In order to qualify as a dealer in intangibles, R.C. 5725.01 (B) requires that an "office or other place of business' be kept in this state.

Sun has decided to operate its business using separately incorporated divisions rather than non-corporate branch offices or subsidiaries, apparently in order to limit its tort and contract liability. In so doing, however, Sun has exposed itself to greater R.C. Chapter 5725 tax liability, for each such separately incorporated division must keep an "office or other place of business" in this state to qualify as a dealer in intangibles. Since no such offices exist, loans discounted by Sun's separately incorporated out-of-state divisions may not be included in the denominator of the R.C. 5725.15 allocation formula.

This result is mandated by statute, even though all such loans must be included in the assets of Sun in making the fair value computation required by R.C. 5725.13. Sun is the parent corporation, and, as such, its capital account includes the value of its wholly-owned, separately incorporated, out-of-state divisions. This capital is available for use in this state and thus is "capital employed" in this state in accordance with R.C. 5725.13.

For the foregoing reasons, the decision of the Board of Tax Appeals is unreasonable and unlawful, and is reversed.

Decision reversed.

O'NEILL, C.J., CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

HERBERT, J., concurs in the judgment only.

THE SUPREME COURT OF THE STATE OF OHIO
1976 TERM

No. 75-105

THE STATE OF OHIO,
City of Columbus.

SUN FINANCE & LOAN CO.,
Appellee,

vs.

ROBERT J. KOSYDAR, TAX COMMR.,
Appellant.

REHEARING

To wit: April 23, 1976

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of April, 1976.
THOMAS L. STARTZMAN, Clerk.

By ..... Deputy.